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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1937

No. 502

JOHN N. SHANNAHAN AND CLAUDE J. JACKSON, AS TRUSTEES OF THE PROPERTY OF CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA SOUTH BEND DIVISION

Brief for Appellants.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA SOUTH BEND DIVISION

Brief for Appellants.

Appeal From Final Decree.

This is an appeal from a decree entered September 17, 1937 (R. 29) by the District Court of the United States for the Northern District of Indiana, South Bend Division, dismissing the suit for want of jurisdiction, one judge

dissenting. The petition for appeal, with the assignments of error, was presented and allowed September 17, 1937 (R. 30 to 34).

The Petition.

June 22, 1936, appellants filed their petition (R. 1 to 6) pursuant to Section 209 of the Judicial Code (Title 28 U. S. C. A. Sec. 45), invoking the jurisdiction of the court under the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Statutes at Large, 208, 219 (28 U. S. C. A. Sec. 41, Subdiv. 28) to set aside, annul and suspend the order, finding and determination of the Interstate Commerce Commission made February 14, 1936 (214 I. C. C. 167 to 173) in a proceeding under Section 1 of the Railway Labor Act, as amended June 21, 1934, Chapter 691, Section 1, 48 Statutes at Large, 1185 (Title 45 U. S. C. A. Sec. 151) determining:

> "That the line of the Chicago South Shore and South Bend Railroad is not a street, interurban or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and it is, therefore, subject to the provisions of that act."

The petition alleges that the Commission in making and issuing said order, finding and determination, erred as a matter of law in the following particulars, to-wit:

(a) Said order, finding and determination is contrary to the indisputable character of the evidence;

(b) The facts found by said Commission do not, as a matter of law, support the order, finding and determination of the Commission;

(c) Said order, finding and determination is unsupported by the evidence, is without supporting evidence and is arbitrary; and

(d) The line of the Chicago South Shore and South Bend Railroad is an interurban electric railway within the exemption proviso of the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and is not operated as a part of a general steam railroad system of transportation (R. 4).

The petition prays that the order, finding and determination of the Commission be set aside, annulled and suspended and that the enforcement of said order, finding and determination be enjoined (R. 5).

Answer of the United States.

July 6, 1937, the United States filed its answer (R. 7 to 9) claiming that:

(a) The court was without jurisdiction because the alleged order of the Commission complained of was not an order within the meaning of the Urgent Deficiencies Act; and

(b) Denying the allegations of the petition.

Intervention by Commission.

August 17, 1936, the Interstate Commerce Commission intervened and filed its answer (R. 9 to 12):

(a) Denying the allegations of the petition; and

(b) Claiming the determination and report of the Commission was not an order within the meaning of the Urgent Deficiencies Act and for that reason the court was without jurisdiction.

Hearing.

A special three-judge statutory court was convened pursuant to the provisions of the Urgent Deficiencies Act (R. 22). May 18, 1937, the court heard the evidence and argu-

ments of counsel and took the case under advisement (R. 22). On August 16, 1937, an opinion (R. 22 to 24) and dissenting opinion (R. 24 to 27) were filed, the majority opinion holding that the three-judge statutory court must decline to take jurisdiction because the determination of the Commission was not an order.

Special Findings of Fact and Conclusions of Law.

September 17, 1937, special findings of fact and conclusions of law were made and entered by the court (R. 27 to 28). The findings and conclusions, omitting formal parts, are as follows:

"FINDINGS OF FACT.

"1. That on or about May 17, 1935, pursuant to request made of it by the National Mediation Board, the Interstate Commerce Commission instituted a proceeding entitled Railway Labor Act Docket No. 8, *Chicago, South Shore and South Bend Railroad,* wherein it undertook to determine whether said railroad was a street interurban or suburban electric railway such as falls within the exemption proviso of Section 1 of the Railway Labor Act, excluding from the force and effect thereof carriers of classes in said section described. That after due notice to all parties and a hearing, in which the Commission heard all the evidence offered by parties interested in said proceeding, the Commission issued a report, which appears as Exhibit A to its answer and is officially reported 214 I. C. C. 167. That in said report the Commission found and determined that said railroad is not a street interurban or suburban electric railway within the term of said exemption proviso and that it is, therefore, subject to the provisions of said Railway Labor Act.

"2. That the petition denominates and describes the Commission's said report, finding and determination as an 'order,' as said term is used in the Urgent Deficiencies Act of October 22, 1913, above referred to, and prays that said finding and determination be set aside, annulled and suspended and that the enforcement thereof be enjoined. Said petition further invokes the jurisdiction of a statutory three-judge court as provided for in said Urgent Deficiencies Act, pursuant to which this court has been convened.

"3. That the answers of both defendants deny that said report, finding and determination of the Commission constitute an order as to which a three-judge court has power or jurisdiction under the statute to enjoin, set aside, annul or suspend, and moved that this statutory court dismiss said petition for lack of jurisdiction.

"Conclusions of Law.

"1. The report, finding and determination of the Commission, with respect to the petitioners' railroad, made pursuant to the provisions of the Railway Labor Act, as referred to in the above findings of fact, is not an order of the Commission which, under the terms of the Urgent Deficiencies Act, this statutory court has jurisdiction to enjoin, set aside, annul or suspend.

"2. Since this court has no jurisdiction over the subject matter of the petitioners' petition, this suit should be dismissed by this court for lack of jurisdiction."

Final Decree.

An order was entered by the court on September 17, 1937, dismissing the suit for want of jurisdiction (R. 29).

Opinion Below.

The opinion of the three-judge statutory court appears in the printed record in this case (R. 22 to 27). The opinion has been reported in *Shannahan et al.* v. *United States*, 20 Fed. Supp. 1002 (advance sheets).

Jurisdiction of the Court.

Paragraph 1 of Rule 12 of this court has been complied with.

Statement of the Case.

On August 9, 1934, the National Mediation Board, pursuant to Section 1, First, of the Railway Labor Act, as amended June 21, 1934, 48 Statutes at Large, 1185 (45 U. S. C. A. Sec. 151) requested the Interstate Commerce Commission to determine whether the lines of railroad operated by Chicago South Shore and South Bend Railroad, herein called "South Shore," fall within the terms of the proviso of the first paragraph of said Section 1, which proviso exempts from the terms of the Act any street, interurban or suburban electric railway unless such railway is operating as a part of a general steam railroad system of transportation (R. 39).

On May 17, 1935, the Interstate Commerce Commission, pursuant to said request of the National Mediation Board, gave notice to the South Shore that the matter of determining the status of the South Shore under the proviso of the first paragraph of Section 1 of the Railway Labor Act had been assigned for hearing at the Hotel Morrison, Chicago, Illinois, June 29, 1935 (R. 39). At that time and place the South Shore appeared and introduced evidence, oral and documentary, in support of its claim that it was an interurban railway and exempt from the Railway Labor

Act. On August 9, 1935, the South Shore filed its brief with the Commission and the case was argued orally before the Commission on November 19, 1935. On December 30, 1935, John N. Shannahan and Claude J. Jackson, as Trustees of the property of the South Shore, filed their written appearance in the proceedings.

On February 14, 1936 (R. 56), the Interstate Commerce Commission filed its report (214 I. C. C. 167, 173) (R. 13 to 22). The report recites the proceedings and summarizes the evidence, concluding by determining that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban or suburban electric railway.

A printed copy of the report is attached to the answer of the Commission (R. 13 to 22).

On April 11, 1936, the South Shore filed its petition for rehearing and on May 11, 1936, the Commission by a formal order denied the petition for rehearing, using the following language:

> "It is ordered, that said petition be, and it is hereby, denied" (R. 56, 57).

At the hearing before the statutory court on May 18, 1937, the appellants introduced in evidence a complete transcript of all the testimony and proceedings before the Interstate Commerce Commission (R. 38 to 57).

The majority of the court declined to consider the case on the merits and filed an opinion holding that the statutory court was without jurisdiction because the determination by the Commission did not constitute an order (R. 22 to 24). One judge dissented, holding that the determination constituted an order and that the court had jurisdiction (R. 24 to 27).

Special findings of fact were entered (R. 27 to 28) and the court's conclusions of law were stated (R. 28), in which the majority held that the report of the Commission did not constitute an order and the court was without jurisdiction. This was followed on September 17, 1937, by the final order dismissing the suit for want of jurisdiction (R. 29).

The South Shore is an Interurban.

The South Shore was incorporated in 1925 under an Act of the State of Indiana entitled "An Act to Provide for the Incorporation of Street Railroad Companies," approved June 4, 1861, and the various acts amendatory thereof and supplementary thereto (R. 39). Its Articles of Association were filed with the Secretary of State of Indiana and recorded in the recorder's office of LaPorte County, Indiana, on June 23, 1925. The objects and purposes of the South Shore as stated in its Articles of Association are to maintain and operate, construct, purchase, lease, or otherwise acquire, own and control street railroad, interurban street railroad and suburban street railroad lines and systems (R. 40).

On July 10, 1925, the South Shore was admitted to do business in Illinois as a street, interurban and suburban railroad. It accepted the provisions of the Indiana General Corporation Act by executing its Articles of Reorganization and filing them with the Secretary of State of Indiana on September 18, 1929. Its Articles of Reorganization, like the original Articles, authorize the operation of street, interurban and suburban lines (R. 40, 41).

The first paragraph of Section 1 of the Railway Labor Act defines the term "carrier" as including among others any carrier by railroad subject to the Interstate Commerce Act, which is followed by a proviso excluding inter-

urbans, unless such railway is operating as a part of a general steam-railroad system of transportation. The South Shore is operated with electric power, and none of its capital stock is owned by any steam railroad. It is not operated as a part of a general steam-railroad system of transportation (R. 43). The only issue before the Commission was whether it was an interurban as that term is used in the proviso.

The South Shore operates an electric railroad between Chicago, Illinois, and South Bend, Indiana, 89.78 miles (R. 44). Approximately 6.39 miles of its line between the Indiana-Illinois State Line and Kensington, Illinois, is leased from the Kensington & Eastern Railroad Company, a subsidiary of the Illinois Central Railroad Company, and the South Shore has trackage rights over the Illinois Central's electrified suburban line between Kensington and Randolph Street in Chicago, 14.2 miles. That portion of the line in Indiana amounting to about 69 miles was constructed between 1907 and 1909 by the Chicago, Lake Shore and South Bend Railroad Company, herein called the "Lake Shore," and was acquired by the South Shore at a foreclosure sale in 1925 (R. 41). Both the South Shore and its predecessor were incorporated in Indiana under an act for the incorporation of street-railroad companies, and the Articles of Incorporation of both have at all times authorized the operation of street, interurban, or suburban lines (R. 39, 41). The original franchises to use the streets in various cities and towns for a street and interurban railway were surrendered in 1922 for an indeterminate permit under the Public Service Commission Law of Indiana (R. 42).

The tracks are of standard gage, generally with 100-pound rails, but some weigh from 70 to 130 pounds per yard (R. 45). Approximately 20.26 miles of the line is

double track, and the balance is single track. Approximately 5.98 miles or 6.6 percent of the line is on public streets, and the balance is on private right of way. The line of the Illinois Central Railroad used into Chicago is elevated. The maximum grade is 2.5 percent, but the ruling grade is level, and the maximum curvature is 10°. The roadbed is generally ballasted with gravel, and compares favorably with some of the steam railroads in the same vicinity, but is not equal to those of the large trunk lines. A block-signal system is used, together with interlocking-signal devices at crossings with several other railroads. There are no cattle guards along the line.

The South Shore operates 32 passenger trains each way daily over all or portions of its line, most of which consist of one or two coaches (R. 46, 47). The maximum number of coaches per train is ordinarily 5 or 6, although occasionally as many as 10 coaches are handled on excursion trains, and in one instance 20 coaches were handled with a locomotive. The South Shore has 62 passenger cars, of which 49 are motor cars and the balance trailers. Their seating capacity ranges from 44 to 56 passengers compared with from 76 to 98 in steam-railroad cars. This carrier also has two dining cars and four parlor cars, which are not now in use. Ten of the passenger cars have baggage compartments, and baggage and express are carried. Passenger stations and agents are maintained by the South Shore at eight points, and it uses six Illinois Central passenger stations at various places in Chicago. Stops are also made on signal at highway crossings in the country between regular stations. The local passenger fares of the South Shore are on the basis of 3.6 cents per mile, which generally applies on the steam railroads in this territory. No interline tickets are sold except in connection with the Illinois Central and the Chicago, Indianapolis & Louisville Railway,

which represents less than one half of 1 percent of the South Shore's passenger business.

This line had no freight business prior to 1916 (R. 50). Since then, its freight revenue has gradually increased from $4,807 in that year to a maximum of $1,596,246 in 1930. During each of the last four years preceding the hearing, 1931 to 1934, inclusive, its freight revenue exceeded its passenger revenue. The freight traffic is of a mixed character. No livestock is handled (R. 51, 52). Over 90 percent of the freight handled by the South Shore is interchanged with other railroads and moves in interstate commerce. The commodity handled in largest volume is coal, which is received from lines on the east and delivered to other lines on the west. The South Shore is also an intermediate carrier with respect to grain moving east. It is a party to a large number of tariffs publishing joint rates to and from points throughout the country (R. 50). The South Shore maintains a traffic organization at Chicago and other points on its line, and it also has off-line solicitors at Minneapolis, Minnesota, Kansas City, Missouri, Seattle, Washington and in Wisconsin.

This carrier has 14 electric locomotives, with a rating of 4,000 tons each, which are used for hauling its freight trains (R. 48). These generally consist of from 40 to 55 cars, although 60 to 70 cars have been handled occasionally, and one instance is referred to of an 87-car train. The South Shore has only 16 revenue-freight cars, and the bulk of its freight is handled in foreign-line equipment. This is repaired when necessary in the South Shore's shops under rules of the American Railway Association, an average of about 100 cars per month being so repaired. Direct connections for the interchange of carload freight are maintained with seven trunk lines and six belt or switching lines which serve the Chicago district. The

number of carloads of freight interchanged with these connections in recent years has ranged from 29,674 to 58,790 per year. Practically the only freight which is not interchanged is a small amount of less-than-carload traffic. Formerly the South Shore had a large amount of less-than-carload business, but this has largely been lost to the trucks. The South Shore has 25 passenger crews and 5 freight crews. Its employes averaged 832 in 1928 and 463 in 1934.

The South Shore was not under Federal control during the World War emergency period (R. 51). Although its freight revenues have slightly exceeded its passenger revenues during the years 1931, 1932, 1933 and 1934, the passenger revenues of the Class I steam railroads averaged only 10.6 percent of their total revenues in 1933 and were only 20.8 percent in 1920, when passenger revenues apparently reached their peak (R. 51).

The evidence introduced by Appellants before the Commission establishes without contradiction the following facts:

(1) The South Shore is incorporated under the laws of the State of Indiana as an interurban railroad (R. 40).

(2) The laws of Indiana authorize the South Shore as an interurban railroad to carry freight (R. 49, 50). Sec. 55-3602 Burns Indiana Statutes Annotated 1933 ed.

(3) The South Shore is admitted as a foreign corporation to do business as an interurban railroad in Illinois and to carry passengers and property (R. 40).

(4) The laws of Indiana give the South Shore as an interurban railroad the right to condemn and take

property for right of way and railroad purposes by eminent domain, Paragraph 55-3601 Burns Indiana Statutes Annotated 1933 edition (R. 45).

Pars. 13274 and 13279 Burns Annotated Indiana Statutes 1926 ed.

Par. 3-1713 Burns Indiana Statutes Annotated 1933 ed.

(5) The percentage of operating revenues derived by the South Shore from the transportation of freight was greatest in 1932 when the revenue from freight was 51.45 percent of the total operating revenues of the South Shore. Before and since 1932 the percentage has been less. The percentage of operating revenues derived from the transportation of freight by all Class I railroads in the United States in 1933 was approximately 89 percent (R. 51).

(6) For 7 years from 1909 to 1915 no freight was carried over the railroad now operated by the South Shore (R. 50).

(7) The South Shore was not under Federal control during the World War or subsequent thereto (R. 51).

(8) The South Shore is restricted by the provisions in a deed covering 6 miles of its right of way in Gary from carrying live stock over said six miles of right of way (R. 51, 52).

(9) The Supreme Court of Indiana in *Chicago Lake Shore and South Bend Railway Company* v. *Guilfoyle,* 198 Ind. 9, held that the property now owned by the South Shore was an interurban railroad property and it was proper to haul freight over the tracks in the streets of South Bend, Indiana (R. 42).

(10) The tracks of the interurban are not an additional servitude when constructed in the public streets and therefore interurbans are classed with street railways and not with steam railroads under the laws of Indiana (R. 42).

(11) The South Shore operates exclusively with electric power. It operates 64 passenger trains daily. It has 25 passenger crews and 5 freight crews (R. 52).

(12) The South Shore is not operated as a part of a general steam railroad system of transportation (R. 43).

Specification of Errors Urged.

Appellants urge all the errors assigned (R. 33 to 34).

The determination by the Commission was an order and the conclusion of the court that it was not an order is erroneous. The statutory court had jurisdiction of the suit and erred in dismissing it.

POINTS AND AUTHORITIES.

I.

The Three-Judge Statutory Court Had Jurisdiction.

(1) *Statutes Concerning Jurisdiction.*

The District Court shall have original jurisdiction as follows:

"* * *

"Twenty-eighth. Of cases brought to enjoin, *set aside, annul, or suspend,* in whole or in part any order of the Interstate Commerce Commission.

"* * *"

38 Statutes at Large, 219; 28 U. S. C. A. Sec. 41 (28).

Sec. 209 Judicial Code; 28 U. S. C. A. Sec. 45.

A three-judge statutory court is required.

38 Statutes at Large, 220; 28 U. S. C. A. Sec. 47.

United States v. *Idaho,* 298 U. S. 105, 110; 80 L. ed. 1070, 1074-5.

Claiborne-Annapolis Ferry Co. v. *United States,* 285 U. S. 382, 390-91; 76 L. ed. 808, 814.

Brooklyn Eastern District Terminal v. *United States,* 28 Fed. (2d) 634, 635.

(2) *Order Not Subject To Collateral Attack.*

An order of the Interstate Commerce Commission is not subject to collateral attack and a suit to set it aside must be brought against the United States.

Sec. 208 and 211 Judicial Code; 28 U. S. C. A. Sec. 46 and 48.

Venner v. *Michigan Central Railroad,* 271 U. S. 127, 130-131; 70 L. ed. 868, 869, 870.

Village of Mantorville v. *Chicago & Great Western Railroad,* 8 Fed. Supp. 791, 795-797.

(3) *The Railway Labor Act.*

The first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, reads as follows:

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': *Provided,* however, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Com-

mission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to *determine*, after hearing *whether any line operated by electric power falls within the terms of this proviso.*"

48 Statutes at Large, 1185; 45 U. S. C. A. Sec. 151.

The language of the statute requires a determination. The Commission cannot decline jurisdiction and the statute clothes the determination with the status of an order. The Commission cannot by any device avoid these consequences.

In addition to the Railway Labor Act, the following federal statutes exempt street, interurban or suburban electric railways from compliance with their requirements:

Paragraph 22 of Section 1 of the Interstate Commerce Act relating to extensions and abandonment of facilities. 49 U. S. C. A. Sec. 1 (22).

Section 15(a) of the Interstate Commerce Act relating to fair return for carriers. 49 U. S. C. A. Sec. 15(a).

Section 20(a) of the Interstate Commerce Act relating to securities. 49 U. S. C. A. Sec. 20(a).

Federal Control Act passed during the World War, 40 St. L. 451.

Section 204 of the Transportation Act of 1920, 49 U. S. C. A. Sec. 73(a).

Section 209 of the Transportation Act of 1920, 49 U. S. C. A. Sec. 77(a).

The Boiler Inspection Act, 45 U. S. C. A. 22.

Carriers Taxing Act, approved August 29, 1935, Sec. 11.

(4) *Substance Not Form Controls.*

The jurisdiction of courts to review orders of the Commission is not dependent upon the form in which the order is couched.

> *Alton Railroad Co.* v. *United States,* 287 U. S. 229, 237; 77 L. ed. 275, 281.

A certificate of convenience and necessity permitting the abandonment of a railway, so far as it permits abandonment, is not in form an order. But the courts look to the substance and take jurisdiction of a suit to enjoin enforcement on the ground that the certificate is an order.

> *United States* v. *Idaho,* 298 U. S. 105, 110; 80 L. ed. 1070, 1075.
>
> *Colorado* v. *United States,* 271 U. S. 153, 159-170; 70 L. ed. 878, 881-886.

Over-emphasis upon the mere form of the order may not be permitted to obscure its purpose and effect.

> *Powell* v. *United States,* 300 U. S. 276, 284, 285; 81 L. ed. 423, 427. (Adv. sheets)

(5) *The Commission's Action Was Quasi Judicial and Reviewable.*

The proviso of the first paragraph of the Railway Labor Act authorizes the Interstate Commerce Commission upon request of the Mediation Board or upon complaint of a party interested *"to determine after hearing"* whether any line operated by electric power falls within the terms of the proviso.

Quasi judicial action is thereby prescribed.

The Commission can make the *determination* only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding

in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action. An order unsupported by evidence is void.

Baltimore & Ohio Railroad Co. v. *United States,* 264 U. S. 258, 264-265; 68 L. ed. 667, 673, 674.

The Commission was not at liberty to decline to exercise its jurisdiction. The Railway Labor Act imposes upon it the obligation to make the determination. The determination was made by the Commission within the scope of its duty to regulate interstate commerce.

Alton Railroad Co. v. *United States,* 287 U. S. 229, 236; 77 L. ed. 275, 281.

United States v. *Baltimore & Ohio Railroad Co.,* 293 U. S. 454, 458 to 462.

Where the quasi judicial function is exercised the order is reviewable.

United States v. *Los Angeles & Salt Lake Railroad Co.,* 273 U. S. 299, 309; 71 L. ed. 651, 655.

The determination by the Commission fixes the *status* of the South Shore. By the determination the carrier is not an interurban within the exemption proviso of the first paragraph of Section 1 of the Railway Labor Act, and the obligations of that act are thereby fixed upon the carrier. Such determination is in substance a reviewable order.

United States v. *Los Angeles & Salt Lake Railroad Co.,* 273 U. S. 299, 309-310; 71 L. ed. 651, 655.

Piedmont & Northern Ry. Co. v. *United States,* 280 U. S. 469, 477; 74 L. ed. 551, 555.

Baltimore & Ohio Railroad Co. v. *United States,* 264 U. S. 258, 263; 68 L. ed. 667, 673.

Delaware & Hudson Co. v. *United States,* 266 U. S. 438, 448; 69 L. ed. 369, 371-2.

While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function.

Nashville, Chattanooga & St. Louis R. Co. v. *Wallace*, 288 U. S. 249, 259-64; 77 L. ed. 730, 733-736.

Powell v. *United States*, 300 U. S. 276, 284, 285; 81 L. ed. 423, 427. (Adv. sheets)

(6) *The Legal Effect of Evidence Is a Question of Law.*

Administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the indisputable character of the evidence; or if the facts found do not as a matter of law support the order made.

Whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law—are all matters within the scope of judicial power.

Interstate Commerce Commission v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, 91 and 92; 57 L. ed. 431, 433.

Interstate Commerce Commission v. *Union Pacific Railroad Company*, 222 U. S. 541, 547 and 548; 56 L. ed. 308, 311.

In the tap line cases it was held that the determination on undisputed facts of the question whether a line of railroad is a plant facility or a common carrier, is a conclusion of law subject to judicial review.

United States v. *Louisiana & Pacific Ry. Co.* (the tap line cases) 234 U. S. 1, 22; 58 L. ed. 1185, 1193.

Where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact but one of law which is the duty of the courts to examine and decide.

Florida East Coast Ry. Co. v. *United States*, 234 U. S. 167, 185 and 186; 58 L. ed. 1267, 1271 and 1272.

Baltimore & Ohio Railroad Co. v. *United States*, 264 U. S. 258, 262-266; 68 L. ed. 667, 673-674.

Whether certain trackage is a "spur" is a mixed question of fact and law for the decision of the court in reviewing the Commissioner's order.

United States v. *Idaho*, 298 U. S. 105, 107-110; 80 L. ed. 1070, 1073-1075.

To refuse to consider evidence introduced, or to make an essential finding without supporting evidence is arbitrary action.

Baltimore & Ohio Railroad Company v. *United States*, 264 U. S. 258, 265; 68 L. ed. 667, 674.

(7) *Order May Be Set Aside For Lack of Substantial Evidence.*

The findings of the Commission may be set aside for lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law.

Skinner & Eddy Corp. v. *United States*, 249 U. S. 557, 562; 63 L. ed. 772, 6.

An order based upon a finding made without evidence (*Chicago Junction Case—Baltimore & Ohio R. R. Co.* v. *United States*, 264 U. S. 258, 263, 68 L. ed. 667, 673), or upon

a finding made upon evidence which clearly does not support it (*Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 7, 56 L. ed. 308, 311), is an arbitrary act against which courts afford relief.

> *Northern Pacific R. R. Co.* v. *Dept. of Public Works of Washington*, 268 U. S. 39, 44-45; 69 L. ed. 836, 841.

(8) *Orders Held Not Reviewable Are Distinguishable.*

When the affirmative relief sought is denied by the Commission, judicial review is refused on that ground. *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282, 56 L. ed. 1091. The taking of jurisdiction in such cases would involve the court in the exercise of the administrative function of granting the relief which the Commission, in the exercise of its jurisdiction, had denied.

The mere fact that an order dismisses a complaint does not make it a negative order. The effect of such an order was held to leave in force the rule attacked in the complaint.

> *United States* v. *New River Co.*, 265 U. S. 533, 539-541; 68 L. ed. 1165, 1171-1172.
>
> *Baltimore & Ohio Railroad Company* v. *United States*, 264 U. S. 258, 264; 68 L. ed. 667, 673-674.

The Commission's functions are manifold in character.

In some matters its duty is merely to investigate and report facts.

> *United States* v. *Los Angeles & Salt Lake Railroad Co.*, 273 U. S. 299, 310; 71 L. ed. 651, 655.

In others the determination was not within the scope of the Commission's duty to regulate commerce, but was

in substance a suit against the government to recover money.

Great Northern Ry. Co. v. *United States*, 277 U. S. 172, 180, 2; 72 L. ed. 838, 841, 842.

In other cases its action has been held advisory (*Minneapolis & St. L. R. Co.* v. *Peoria & P. U. R. Co.*, 270 U. S. 580, 584, 585, 70 L. ed. 743, 745, 746) supervisory, directory.

United States v. *Atlanta, Birmingham & Coast R. R. Co.*, 282 U. S. 522, 527, 528; 75 L. ed. 513, 518.

Atlanta, Birmingham & Coast R. R. Co. v. *United States*, 296 U. S. 33; 80 L. ed. 25.

An order fixing a date of hearing before the Commission is not reviewable, as it has no characteristics of an order, affirmative or negative. It is a mere incident in the proceeding.

United States v. *Illinois Central Railroad Co.*, 244 U. S. 82, 89; 61 L. ed. 1007, 1010.

An order declaring the tentative value of the property of a railroad company is not reviewable, being an ex parte appraisement without probative effect.

Delaware & Hudson Company v. *United States*, 266 U. S. 438, 445-49; 69 L. ed. 369, 370-72.

The findings on which a reparations order is based are not reviewable.

Brady v. *Interstate Commerce Commission*, 43 Fed. (2d) 847; affirmed 283 U. S. 804.

In *Lehigh Valley Railroad Company* v. *United States*, 243 U. S. 412, 414, 61 L. ed. 819, the Commission dismissed the petition of the Railroad asking for a hearing as to

whether the services of a steamboat line owned by it would be in violation of the Panama Canal Act (49 U. S. C. A. Sec. 5, par. 10, 11 and 12) and for an extension of time.

The order of the Commission was negative in substance as well as in form. The risk of penalties is imposed by the statute and not by the order. The relief sought having been denied, the case is like *Proctor & Gamble* v. *United States*, 225 U. S. 282.

In *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469, 476, 477, 74 L. ed. 551, the railroad applied for a certificate to make an extension under Paragraph 18 of Section 1 of the Interstate Commerce Act (49 U. S. C. A. Sec. 1 (18)). The railroad moved to dismiss its application for want of jurisdiction; the Commission overruled the motion, took jurisdiction and denied the application on its merits.

The order was therefore negative in substance as well as in form and infringed no right of the railroad. If, as the railroad contends, the Commission was without jurisdiction, the railroad is free to proceed with the construction as if the Commission had not acted. If the railroad is prosecuted for proceeding without a certificate, the risk arises from the statute and not from the order of the Commission. The affirmative relief sought having been denied the case is like *Proctor & Gamble* v. *United States*, 225 U. S. 282.

In *Pittsburgh & West Virginia Railway Co.* v. *United States*, 281 U. S. 479, 486 to 488, 74 L. ed. 980, 983, the railway had intervened in proceedings before the Commission. The intervenor was a connecting carrier and a minority stockholder of the Wheeling & Lake Erie Railway Company. The Supreme Court held that the appellant was not entitled to bring a suit under the Urgent Deficiencies

Act to set aside the order of the Commission, because its status as an intervenor before the Commission and as a connecting carrier and minority stockholder of the Wheeling & Lake Erie Railway Company does not entitle it to institute an independent suit to set aside the Commission's order.

In the South Shore case the determination by the Commission fixes the status of the South Shore and makes the carrier affirmatively subject to the obligations of the Railway Labor Act, and hence the determination and order of the Commission fixing the status fixes the obligations and the risk.

In the *Lehigh Valley* and *Piedmont* cases the orders of the Commission were negative and dismissed the petitions, denying the affirmative relief that was sought. In the *South Shore* case the relief sought by the petition was granted, that is, the status of the railroad was determined as prayed.

(9) *That the Determination and Order of the Commission was Made Under the Railway Labor Act does not Deprive the Court of Jurisdiction to Set it Aside.*

A three-judge statutory court has no jurisdiction to set aside a certificate of the Commission issued to the Secretary of the Treasury ascertaining and certifying the amount due a railroad on termination of Federal control because the subject matter is not within the scope of the Commission's duty to regulate commerce. Such suit is in substance, as well as in name, a suit against the government to recover money.

Great Northern Ry. Co. v. *United States*, 277 U. S. 172, 180-82; 72 L. ed. 838, 841-842.

An order of the Interstate Commerce Commission under the Boiler Inspection Act, 43 Statutes at Large, 659, 45

U. S. C. A., Section 22, was set aside for lack of essential basic findings of fact.

United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 458 and 462; 79 L. ed. 587, 591-2, 594-5.

The Railway Labor Act is a valid and constitutional regulation of the relations of rail carriers to their employes under the Interstate Commerce clause of the Constitution.

Virginian Ry. Co. v. *System Federation No. 40, etc. et al.*, 300 U. S. 515, 553-559; 81 L. ed. 789, 802-806.

Texas & New Orleans R. R. Co. v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 570; 74 L. ed. 1034, 1046.

(10) *Order and Decree Should be Reversed and Cause Remanded.*

The decree dismissing the bill for want of jurisdiction should be reversed and the cause remanded for further proceedings.

Alton Railroad Co. v. *United States*, 287 U. S. 229, 235-240; 77 L. ed. 275, 277-283.

Baltimore & Ohio Railroad Company v. *United States*, 264 U. S. 258, 260-266; 68 L. ed. 667, 671-674.

II.

The South Shore Is An Interurban.

Section 77(m) of the laws relating to bankruptcy provides that the term "railroad corporation" as used in Section 77 means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban or an interurban

electric railway which is not operated as a part of a general steam-railroad system of transportation or which does not derive more than 50 percent of its operating revenue from the transportation of freight in standard steam railroad freight equipment. This provision is an express recognition that an interurban may derive more than 50 percent of its operating revenue from the transportation of freight in standard steam railroad freight equipment and still maintain its status as an interurban.

The carrier's line of railroad is an interurban. The determination by the Commission is contrary to the indisputable character of the evidence, the facts found by the Commission do not as a matter of law support the order and determination of the Commission, the order and determination is unsupported by evidence, is arbitrary, and the only proper legal conclusion to be drawn from the facts proven is that the line of railroad of the carrier is an interurban.

United States v. *Chicago North Shore & Milwaukee R. R. Co.*, 288 U. S. 1; 77 L. ed. 583.

Piedmont & Northern Ry. v. *Interstate Commerce Commission*, 286 U. S. 299, 305-311; 76 L. ed. 1115, 1120-23.

Piedmont & Northern Ry. v. *United States*, 280 U. S. 469; 74 L. ed. 551.

A street railroad though engaged in interstate commerce is not a railroad under the Interstate Commerce Act.

Omaha & Council Bluffs Street Ry. Co. v. *Interstate Commerce Commission*, 230 U. S. 324; 57 L. ed. 1501.

The provisions of the Interstate Commerce Act that "the provisions of this chapter shall apply to common carriers

engaged in (a) the transportation of passengers or property wholly by railroad'' etc., (49 U. S. C. A. Sec. 1) was held to include any common carrier engaged in the transportation of passengers or property by railroad in interstate commerce and also applied to an interurban railroad.

United States v. *Hubbard,* 266 U. S. 474.

Similarly, the words ''common carrier by railroad,'' contained in the Federal Employers' Liability Act, *Kansas City Western R. R. Co.* v. *McAdow,* 240 U. S. 51; in the *Safety Appliance Act, Spokane & I. E. R. Co.* v. *Campbell,* 241 U. S. 497; and in the Hours of Service Act, *Denver & Interurban R. R. Co.* v. *United States,* 150 C. C. A. 17, 236 Fed. 685, were applied to interurban electric railroads.

United States v. *Hubbard,* 266 U. S. 474, 479.

In *United States* v. *Hubbard,* 266 U. S. 474 at pages 479 and 480, the opinion directs attention to five sections of the law (cited in note 7) excluding interurbans. The last section cited as excluding interurbans deals with the Labor Board.

Under the laws of Indiana it is well settled (a) that a steam railroad constructed in a public street or highway is an additional servitude, for which an abutting owner is entitled compensation, and (b) that a street railway is not an additional servitude when constructed in a public street or highway and an abutting owner is not entitled to any additional compensation.

Chicago & Calumet Terminal Railway Company v. *Whiting, Hammond & East Chicago Street Railway Company,* 139 Ind. 297; 38 N. E. 604, 605 and 606; 26 L. R. A. 337; 47 Am. St. Rep. 264.

Three cases in Indiana gradually developed the law to where it is equally well settled that an interurban, when constructed in a public street or highway is not an additional servitude, and an abutting owner is not entitled to any additional compensation, but can only recover for negligent or unlawful operations upon proof of special damages.

Mordhurst v. *Ft. Wayne & S. W. Traction Co.*, 163 Ind. 268; 71 N. E. 642.

Kinsey v. *Union Traction Co.*, 169 Ind. 576; 81 N. E. 922, 936 to 947.

Chicago Lake Shore & South Bend Ry. Co. v. *Guilfoyle*, 198 Ind. 9; 152 N. E. 167; 46 A. L. R. 1465.

These cases support the contention of the South Shore that, as an interurban it is not an additional servitude when constructed in the public streets and, therefore, it is to be classed with street railways and not with the steam railroads.

The acts of 1920 of Indiana, Chapter 6, Section 1, page 32, give all interurban railways the right to haul freight. This section appears in Volume 10, Burns Indiana Statutes, Annotated, 1933 Section 55-3602, and is as follows:

"All interurban railway companies now or hereafter organized and operating or which may hereafter operate in this state, in addition to the rights, privileges and powers already given and granted by law to such companies, are hereby empowered to transport over their respective roads and over the tracks of all street and interurban railways over which they have traffic contracts, and over, across and along and upon all highways, streets and alleys and public places occupied by such roads and tracks, or which may, in the

future, be occupied by them, all classes of freight, subject, however, to the rules and regulations of the public service commission of Indiana."

A carrier subject to the Interstate Commerce Act may issue passes to officers, agents and employes of carriers not subject to the Act.

United States v. *Erie R. R. Co.*, 236 U. S. 250, 267-272; 59 L. ed. 567, 571-3.

To prove that an interurban is operated "as a part of a general steam railroad system of transportation" it is necessary to show control of the interurban by a steam railroad for operating purposes. "There must be also unity of ownership or unity of management and control."

Piedmont & Northern Ry. Co. v. *United States*, 30 Fed. (2d) 421, 426.

Piedmont & Northern Ry. v. *Interstate Commerce Commission*, 286 U. S. 299; 76 L. ed. 1115.

ARGUMENT.

I.

The Three-Judge Statutory Court Had Jurisdiction.

The District Court is given original jurisdiction of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission. 38 Statutes at Large, 219; 28 U. S. C. A. Sec. 41 (28). The jurisdiction shall be invoked by filing in the office of the clerk of the court a written petition. Judicial Code Sec. 209; 28 U. S. C. A. Sec. 45. The statute requires the cause to be determined by three judges. 38 Statutes at Large, 220; 28 U. S. C. A. Sec. 47.

Two of the three judges were of the opinion that the determination by the Interstate Commerce Commission was not an order and that the court had no jurisdiction. It was "conceded that it is not the name which the Commission gives to its action or to the document which evidences its action that determines whether it is a finding, a report, or an order." Substance not form controls and the question is whether the "report of the Commission" determining the status of the South Shore is in substance an order.

The proviso of the first paragraph of the Railway Labor Act authorizes the Interstate Commerce Commission upon request of the Mediation Board or upon complaint of a party interested "to determine, after hearing" whether any line operated by electric power falls within the terms of the proviso. Quasi judicial action is thereby prescribed. In *Baltimore & Ohio R. R. Co.* v. *United States,* 264 U. S.

258, 264, 265, this court said, "Congress, by using the phrase 'whenever the Commission is of the opinion, after hearing' prescribed quasi judicial action." The Commission can make the determination only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. An order unsupported by evidence is void. *Baltimore & Ohio R. R. Co.* v. *United States, supra.* Where the quasi judicial function is exercised the order is reviewable. The determination of the Commission fixing the status of the South Shore was the exercise of a quasi judicial function and is reviewable. *United States* v. *Los Angeles & Salt Lake Ry. Co.*, 273 U. S. 299, 309.

The Railway Labor Act does not make the determination by the Commission of the status of the carrier conclusive. Failing to make this determination conclusive the order is subject to review.

If the determination remains open to collateral attack the "*determination*" by the Commission is tentative.

If reviewable directly, uniformity in the classification by the Interstate Commerce Commisison of electric carriers will be advanced.

The determination by the Commission fixes the status of the South Shore. By the determination the carrier is not an interurban within the exemption proviso of the first paragraph of Section 1 of the Railway Labor Act. The obligations of that act are thereby fixed upon the carrier. Such determination is in substance a reviewable order.

That the action is quasi judicial is stressed by the allegations in relation to request, notice, hearing, participation, evidence, findings, conclusions and determination, made in

the answer of the Commission (R. 10, 11), and appears from the findings of fact made by the court (R. 27, 28).

The legal effect of the evidence submitted to the Commission is a question of law. The determination on undisputed facts of the question, whether the South Shore is an interurban is a conclusion of law, subject to judicial review.

The majority opinion relies on the rule established in *Proctor & Gamble Company* v. *United States*, 225 U. S. 282, and the subsequent authorities following it. In those cases affirmative relief sought being denied by the Commission, a judicial review was refused. The orders in such cases were purely negative orders and to review the order would have involved the court in the exercise of the administrative functions of granting the relief which the Commission had denied.

In determining the status of the South Shore the affirmative relief sought was not denied, but, on the contrary, the status of the carrier was determined. In fact, the Commission was not at liberty to decline to exercise its jurisdiction. The Railway Labor Act imposes upon the Commission the obligation to make the determination. *Alton Railroad Company* v. *United States*, 287 U. S. 229, 236.

In *Great Northern Railway Company* v. *United States*, 277 U. S. 172, 180, 182, the certificate of the Commission, issued to the Secretary of the Treasury, ascertaining and certifying the amount due a railroad on termination of federal control, was not given within the scope of the Commission's duty to regulate commerce and review was denied because the suit brought was in substance, as well as in name, a suit against the government to recover money instead of a suit to set aside an order of the Commission.

Orders of the Interstate Commerce Commission may be set aside although not made under the Interstate Commerce

Act. For example, an order of the Interstate Commerce Commission under the Boiler Inspection Act, 43 Statutes at Large, 659, 45 U. S. C. A. Sec. 22, was set aside for lack of essential basic findings of fact. *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454, 458 to 462.

The Commission in making the determination of the status of the South Shore under the Railway Labor Act was acting within the scope of its duty to regulate interstate commerce. *United States* v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 458, 462; *Virginian Ry. Co.* v. *System Federation No. 40, etc. et al.*, 300 U. S. 515, 553-559. The Railway Labor Act was sustained as a valid and constitutional regulation of the relation of the rail carriers to their employes under the interstate commerce clause of the constitution of the United States.

The Commission made its determination after hearing and by the determination fixed the carrier's status under the Railway Labor Act. The action was quasi judicial and is reviewable within the meaning of the authorities and a review cannot be defeated by the Commission calling its determination a report instead of an order.

It was argued below that the determination by the Commission that the South Shore is not an interurban is not an order because the determination is incapable of being enforced. This argument is without foundation. *Nashville, Chattanooga & St. Louis R. R. Co.* v. *Wallace*, 288 U. S. 249, 259 to 264.

Take a simple action of debt with judgment for the defendant. Such judgment is utterly incapable of being enforced by execution or otherwise but it does have legal force and effect as is evidenced by the fact that it may be pleaded as *res adjudicata*, but no execution can be taken upon such judgment and there is no method by which it

can be enforced except by pleading. Moreover, the plaintiff can appeal from such a judgment for the defendant and contend that it is erroneous and should be set aside. The fact that the plaintiff can appeal demonstrates that such a finding for the defendant is a judgment and has legal force and effect even though no execution can be levied thereon for the simple reason that the plaintiff could not appeal from such a finding if it were not a judgment because courts, either original or appellate, do not deal with non-judicial or non-justiciable matters.

In proceedings to establish the heirs of a decedent, infancy, insanity, or other status, the determinations made are clearly judgments even though no execution or method of enforcing the same exists. Also proceedings to quiet title when founded upon adverse possession, a bill for the construction of a will, a bill by trustees to a court for instructions as to what action to take or perform, clearly have such a character though no execution will lie thereon, and yet they are all judgments and present a justiciable controversy to the court. A decree adjudicating a man a bankrupt, probating a will, naturalizing an applicant, establishing the legitimacy of a child or the existence of a marriage, or the terms and provisions of a lost will, note or other instrument, or a bill to perpetuate testimony, or for discovery, all have a decree, order or judgment entered thereon which must be respected as having legal force and binding effect, but there is clearly no means provided in the finding, order, judgment or decree to execute the same. The same holds true of a decree annulling a supposed marriage. Such a decree merely announces a conclusion of law which is binding, and which must be respected.

Some or all of the foregoing were pointed out in *Nashville, Chattanooga & St. Louis Railway* v. *Roy C. Wallace,*

288 U. S. 249; 77 L. ed. 730, 735 to 736. The court said (pp. 735-736):

> "While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function * * *. This court has often exerted its judicial power to adjudicate boundaries between states, although it gave no injunction or other relief beyond the determination of the legal rights which were the subject of controversy between the parties, * * * and to review judgments of the court of claims although no process issues against the government."

Subdivision 28 of Section 41, Title 28 U. S. C. A. specifically provides that the district courts shall have original jurisdiction of:

> "All cases brought to *enjoin, set aside, annul or suspend,* in whole or in part, any order of the Interstate Commerce Commission."

The very language of the act conferring jurisdiction upon the district court in cases of the character therein enumerated can only have force and effect and be given point on the assumption that Congress recognized that the orders of the Interstate Commerce Commission would be of different kinds and types. The use of the word "enjoin" clearly shows that Congress anticipated that there would be certain orders of the Interstate Commerce Commission which would command the doing or not doing of certain acts or awarding certain relief, and in those instances an injunction is necessary, and in the case of such orders an execution or something analogous thereto will lie to see that the same are enforced.

The use of the phrase "set aside, annul or suspend" clearly indicates that Congress knew that certain orders of the Interstate Commerce Commission would be, in effect, declaratory in nature but, nevertheless, binding—that is, of such a character that while no execution would lie thereon they would, nevertheless, be invested with a legal operative significance which no one would be privileged to ignore and, therefore, it was sufficient to provide that the court should have jurisdiction not to enjoin such orders but to wipe them out and wholly divest them of any legal significance, and this merely by virtue of a decree to that effect.

If the three-judge statutory court had found either that the challenged determination of the Interstate Commerce Commission is or is not an order, such finding would, nevertheless, be a judgment or order regardless of the fact that no execution or other writ, or other means of enforcing the same is provided by law. If the challenged determination of the Interstate Commerce Commission had been held an order, would appellees take the position, that the provision of the judicial code which authorizes a direct appeal from the judgment of the three-judge statutory court, is unconstitutional and void, as seeking to confer upon the Supreme Court of the United States jurisdiction to review something which is not a judgment for the reason that there is no means of enforcing such determination?

It should be pointed out that the difficulties which have risen with respect to the character of the so-called orders which the United States Supreme Court has held cannot be attacked in the courts have been determinations which have been either advisory to or informative on the part of the Interstate Commerce Commission so as to enable it to perform its work or orders denying the relief sought. In performing the duty cast upon it by the Railway Labor Act of determining as to whether or not the lines of the

South Shore railroad were an interurban, the Interstate Commerce Commission was not merely informing itself so as the better to be able to perform its functions or advise Congress in respect to some action which Congress might desire to take, but was performing a duty which, under the act, it had no option to refrain from performing. Under the terms and provisions of that act the Interstate Commerce Commission had no power to deny relief. In other words, it was utterly without jurisdiction to enter a negative order. The Interstate Commerce Commission had to find one way or the other. The Railway Labor Act required it to find that the line of the South Shore was or was not an interurban railroad. It simply could not enter an order refusing to entertain the petition asking it to proceed and determine the status of the line of the South Shore.

Whatever conclusion the Interstate Commerce Commission came to it necessarily results that it entered an order and it was powerless to refrain from entering an order. If the Interstate Commerce Commission had found that the line of the South Shore was an interurban that determination would have been just as binding upon all parties concerned and would have been entitled to just as much respect as if it had found the opposite and, in such circumstances, the appellants would have been equally privileged to attack such determination.

The "report of the Commission" was quasi judicial in character. It fixed the status of the Railroad and thereby determined the liability of the carrier by fixing upon it the obligations imposed by the Railway Labor Act. This in substance is an order under the law. Accordingly, the three-judge statutory court had jurisdiction to review the order and determination of the Commission and it erred in dismissing the suit for want of jurisdiction.

II.

The South Shore Is An Interurban.

The South Shore is operated by electric power and none of its capital stock is owned by any steam railroad. It is not a part of a general steam-railroad system of transportation. Are its operations those of an interurban as that term is used in the proviso in the first paragraph of Section 1 of the Railway Labor Act?

The reasons advanced in various forms for asserting that the South Shore is not an interurban, finally boil down to the one point that about 51 percent of its revenue is derived from the transportation of freight interchanged with steam railroads. If the South Shore had no freight business it would have to be conceded that it is an electric interurban. Does its freight business change that status?

In *United States* v. *Chicago North Shore and Milwaukee Railroad Company,* 288 U. S. 1, 77 L. ed. 583, the court held the electric interurban railway in question was exempt under the exception contained in Section 20A of the Interstate Commerce Act, 49 U. S. C. A. Section 20A provides that

> "as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) * * *."

The section provides that a carrier subject to it shall not issue securities without first applying to the Commission for approval. It was held that the interurban electric railway in question was within the exception and was not required to apply to the Commission for approval

of its securities. It appeared that about 22 percent of its revenue was derived from freight and that 87 percent of the carload freight traffic was interchanged with steam roads. The Chicago North Shore and Milwaukee Railroad Company is in all respects similar to the South Shore, the difference between the two being that the freight business of the North Shore had developed to where it was 22 percent of its revenue, while the freight business of the South Shore developed in 1932 to the point where it was 51.45 percent of the total revenue. Both railroads were originally constructed to afford fast electric passenger service. During the seven years from 1909 to 1915 no freight was hauled over the lines now owned by the South Shore. The first freight business on the South Shore property was done in 1916. In 1922 the passenger revenue was $598,355 and the freight revenue $241,268, or 28.7 percent of the total. From this point the freight revenue declined until 1926, when it began to grow and by 1930 had increased to $1,596,246, but it was still less than the passenger revenue (R. 50, 51). Since then both the passenger revenue and the freight revenue have declined rapidly, but the passenger revenue declined more rapidly than the freight revenue. In 1932 the freight revenue amounted to $957,419 and was 51.45 percent of the total revenue, which was the highest percentage reached by the freight.

The South Shore has 2,670 preferred stockholders, members of the public. Its equipment trust obligations are also owned by more than 300 investors, members of the public. The holders of the preferred stock are principally small investors of 5 and 10 share lots. The securities have all been issued with the approval of the State Commissions of Illinois and Indiana, but have never been approved by the Interstate Commerce Commission. It has always been considered that the South Shore, like the North Shore, was

exempt as an interurban under the provisions exempting interurbans.

In *Piedmont and Northern Railway* v. *Interstate Commerce Commission*, 286 U. S. 299, 76 L. ed. 1115, the court held that paragraph 22 of Section 1 of the Interstate Commerce Act exempting street, suburban or interurban electric railways (not operated as a part of a general steam railroad system of transportation) from the provisions of paragraphs 18 to 21, requiring a certificate of convenience and necessity for the extension of a line of railroad, did not exempt the Piedmont and Northern Railway. In 1929 its freight revenues were 94.5 percent and its passenger revenues 2.9 percent of the total revenue. Of the freight revenue 95.7 percent was interchanged with steam railroads. The proposed extension would add 128 miles to its present 126 miles and make it the connecting link between the Georgia & Florida Steam Railroad at its southern terminus and the Norfolk & Western at its northern terminus and thereby open a new through and effective route of connecting carriers which would be strongly competitive with existing trunk lines of steam railroad. The court stated, page 311:

> "It thus appears that petitioner's business is • • • in all essential respects conducted as is the business of the steam freight carriers in the territory served. The differences in construction, equipment, operation and handling are incidental merely to the use of electric motive power in lieu of steam. The purely local traffic in freight, passengers, baggage and express *is relatively inconsequential.* • • • The petitioner's railway is of such importance in interstate commerce and renders a service so predominantly devoted to the handling of interstate freight in connection with steam railroads, is in such relation to connecting steam car-

riers, and competes with steam trunk lines in such manner, that in view of the declared policy of the act we cannot hold it an 'interurban' railway within the exemption of the same paragraph."

In the case of the South Shore it cannot be said that the purely local traffic in freight, passengers, baggage and express is relatively inconsequential. The passenger traffic interchanged with steam railroads is less than one-half of one percent of the passenger revenue of the South Shore (R. 47). The passenger revenue of the South Shore prior to 1932 exceeded the revenue from freight in every year and in most of the years greatly exceeded it. Since 1932 the freight revenue has barely preponderated. At present it is about 51 percent from freight and 49 percent from passenger traffic. The South Shore is much nearer to the North Shore case than to the case of the Piedmont & Northern Railway Company.

It was estimated in the Piedmont & Northern Railway Company case that the construction of the proposed extension would result in the diversion of 82,320 cars of freight annually and would more than double the annual revenue. It was stated that for every passenger hauled the Piedmont & Northern hauled a car of freight. Such were the facts before the court when it said that the freight business so predominated and that its business was so pre-eminently interchange freight national in character. The language used referred to a situation where approximately 94.5 percent of the revenue was derived from freight, and does not fairly include a case like the South Shore, which prior to 1931 received more than 50 per cent of its revenue from passenger service, and during the years 1931 to 1934 has received barely 51 per cent of its revenue from freight. With a return of normal conditions it may well be that

the South Shore will again receive most of its revenue from passenger service. Obviously a road to be predominantly and pre-eminently devoted to the handling of interstate freight, national in character, should derive substantially all of its revenue from such source.

The record shows that the South Shore has 25 passenger crews and 5 freight crews. It cannot be very well said that the freight business of the South Shore so predominates as to bring the South Shore under the provisions of the Railway Labor Act.

Section 77(m) of the Bankruptcy Act provides that the term "railroad corporation" means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban, or interurban electric railway, which does not derive more than 50 percent of its operating revenues from the transportation of freight. It follows from this provision that an interurban that does derive more than 50 percent of its revenue from freight may be reorganized under Section 77. This is a recognition by Congress that an interurban may derive more than 50 percent of its revenue from freight and still be classed as an interurban. The exception contained in Section 77(m) divides interurban electric railways into two classes, namely: (a) those which do not derive more than 50 percent of their operating revenue from the transportation of freight, and (b) those that do derive more than 50 percent of their operating revenue from the transportation of freight. Those interurbans that do derive more than 50 percent of their operating revenue from the transportation of freight are included in the term "railroad corporations," as used in Section 77 of the Bankruptcy Act.

The percentage of operating revenues derived by the South Shore from the transportation of freight was great-

est in the year 1932 when the revenue from freight was 51.45% of the total operating revenues. Before and since 1932 the percentage has been less. The gross revenues of all Class I railroads in the United States, as a whole, amounted to $3,095,448,888 in 1933 and of this amount the passenger revenues were $329,341,854, or 10.6% (R. 51). In 1920 passenger revenues of Class I railroads in the United States were apparently at the peak. In that year the total operating revenues of the Class I railroads of the United States were $6,178,438,459, of which the passenger revenue was $1,288,503,573, or 20.8%. The percentage of operating revenues from the transportation of freight received by the South Shore at its peak was far less than the steam railroads enjoyed.

The South Shore, as an interurban, has a lawful right to carry freight. The city ordinances authorizing the original construction of the railroad authorized the carrying of freight. These were surrendered June 14, 1922, for an indeterminate permit. It has the express right, as an interurban railroad, under a statute of Indiana, passed in 1920, to carry freight. The Supreme Court of Indiana in a suit against the Lake Shore, held that the property now owned and operated by the South Shore was an electric interurban railroad property and held that it had a right to carry freight over its tracks in South Bend, Indiana. *Chicago Lake Shore and South Bend Railroad* v. *Guilfoyle,* 198 Ind. 9; 152 N. E. 167, 46 A. L. R. 1465.

The South Shore was incorporated as a street and interurban railroad under the laws of Indiana for the incorporation of street railroads. It has the charter powers of a street and interurban railroad. It has been admitted to do business as a foreign corporation in Illinois as a street and interurban railroad, with the right to carry passengers and property. Since the South Shore was incorporated as an

interurban, and now exists as an interurban corporation with the charter powers granted an interurban under the laws of the state of Indiana, which also give it the right as an interurban to carry freight, the exercise of those charter powers, and the carrying of the freight certainly cannot change its status as an interurban.

Under the laws of Indiana it is well settled (a) that a steam railroad constructed in a public street or highway is an additional servitude, for which an abutting owner is entitled compensation, and (b) that a street railway is not an additional servitude when constructed in a public street or highway and an abutting owner is not entitled to any additional compensation. *Chicago & Calumet Terminal Railway Company* v. *Whiting, Hammond & East Chicago Street Railway Company,* 139 Ind. 297; 38 N. E. 604, 605 and 606; 26 L. R. A. 337; 47 Am. St. Rep. 264.

Three cases in Indiana developed the law to where it is settled that an interurban, when constructed in a public street or highway is not an additional servitude, and an abutting owner is not entitled to any additional compensation, but can only recover for negligent or unlawful operations upon proof of special damages. *Mordhurst* v. *Ft. Wayne & S. W. Traction Co.,* 163 Ind. 268; 71 N. E. 642; *Kinsey* v. *Union Traction Co.,* 169 Ind. 576; 81 N. E. 922, 936 to 947; *Chicago Lake Shore & South Bend Ry. Co.* v. *Guilfoyle,* 198 Ind. 9; 152 N. E. 167; 46 A. L. R. 1465. These cases support the contention of the South Shore that, as an interurban, it is not an additional servitude when constructed in the public streets and, therefore, it is to be classed with street railways and not with the steam railroads.

In *Omaha & Council Bluffs Street Railway Company* v. *Interstate Commerce Commission,* 230 U. S. 324, 57 L. ed. 1501, the court held a street railroad, though engaged in

interstate commerce, is not a railroad under the Interstate Commerce Act (49 U. S. C. A. Sec. 1) which provides:

> "The provisions of this chapter shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad," etc.

In *United States* v. *Hubbard*, 266 U. S. 474, 69 L. ed. 389, the provision of the Interstate Commerce Act that "the provisions of this chapter shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad," etc. (49 U. S. C. A. Sec. 1) was held to include any common carrier engaged in the transportation of passengers or property by railroad in interstate commerce. The Interstate Commerce Commission was held to have jurisdiction to prevent unjust discrimination by interurban electric railroads against interstate commerce, although such railroads are not engaged in general transportation of freight in addition to their passenger and express business. The opinion (pp. 478 to 480) called attention to the fact that neither in the act to regulate commerce, February 4, 1887, nor in any amendment thereto prior to that of June 18, 1910, is there any specific reference to electric railroads. The basis for the jurisdiction of the Commission over them is the generality of the language of the original act, which declared in Section 1 that its provisions "shall apply to any common carrier engaged in the transportation of passengers or of property • • • by railroad." As the act made no distinction between railroads operated by steam and those operated by electricity, the Commission made none. Similarly the words "common carrier by railroad" contained *in the Federal Employers' Liability Act, Kansas City Western R. Co.* v. *McAdow*, 240 U. S. 51, 60 L. ed. 520; *in the Safety Appliance Act, Spokane & I. E. R. Co.* v. *Campbell*, 241 U. S. 497, 60 L. ed. 1125, and *in the Hours of Service Act, Denver &*

Interurban R. Co. v. *U. S.*, 236 Fed. 685, were applied to interurban electric railroads. The correctness of the Commission's action in assuming jurisdiction over the interurban roads is confirmed by the action of Congress, which, in recent amendments of the act to regulate commerce, limited, in respect to certain subjects, the authority over them. In doing so, it provided expressly, in five sections, for the exclusion of certain electric railways from the operation of the powers conferred. The five sections referred to are shown in note 7 to the case and among those five sections, excluding interurbans, is the section of the Railway Labor Act which excludes "a street, interurban or suburban electric railway not operating as a part of a general steam railroad system of transportation." The court in *United States* v. *Hubbard*, 266 U. S. 474, while holding that the general language was sufficient to bring the interurban under the jurisdiction of the Interstate Commerce Commission in reference to its rates specifically directed attention to the fact that the five sections of the statutes excluding interurbans, including the exclusion contained in the Railway Labor Act, deprived the Interstate Commerce Commission of jurisdiction of interurbans in those instances.

Kansas City Western Railroad Co. v. *McAdow*, 240 U. S. 51, at 54, 60 L. ed. 520, holding that interurbans are subject to the Employers' Liability Act under the general language, directs attention to the fact that interurbans are by other sections excluded for other purposes by provisos expressly excluding them.

The labor organizations mentioned the fact that the South Shore interchanges passes with railroads subject to the Interstate Commerce Act. This was proper. A carrier subject to the Interstate Commerce Act may issue passes to officers, agents and employes of carriers not subject to

the act. The bill of the United States to enjoin the Erie Railroad Company from issuing passes to officers, agents and employes of carriers not subject to the act was dismissed, and on appeal to the United States Supreme Court the case was affirmed. *United States* v. *Erie Railroad Company,* 236 U. S. 259, at 267 to 272, 59 L. ed. 567, 571-3.

It is settled law that a determination by the Interstate Commerce Commission should be set aside (1) if contrary to the indisputable character of the evidence or (2) if the facts found do not, as a matter of law, support the order made. *Interstate Commerce Commission* v. *Louisville & Nashville R. R.,* 227 U. S. 88, 91 and 92; 57 L. ed. 431, 433; *Northern Pacific Railroad* v. *Department of Public Works,* 268 U. S. 39, 44 and 45; 69 L. ed. 836, 841; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 562; 63 L. ed. 772, 6.

The uncontradicted evidence before the Commission as shown by the transcript of evidence, shows that the petitioners operate lines of interurban electric railway as said term is used in and within the purview of the Railway Labor Act. The correct application to the undisputed facts of the law as announced by the Supreme Court in *Piedmont & Northern Railway* v. *Interstate Commerce Commission,* 286 U. S. 299, and *United States* v. *Chicago North Shore and Milwaukee Railroad,* 288 U. S. 1, leads to the conclusion that the line of railroad operated by petitioners is an interurban electric railway within the meaning of the exemption proviso of the first paragraph of Section 1 of the Railway Labor Act. The determination of the Commission is contrary to all the evidence, and is against the law.

Conclusion.

(1) The three-judge statutory court had jurisdiction to review the order and determination of the Commission and it erred in dismissing the suit for want of jurisdiction.

(2) A correct application of the law to the undisputed facts leads to the conclusion that the lines of the railroad of appellants are an electric interurban railway under the exemption proviso of the first division of Section 1 of the Railway Labor Act and that there is no substantial evidence to support the conclusion and determination of the Commission.

The judgment of the District Court should be reversed.

Respectfully submitted,

JOHN C. LAWYER,
R. STANLEY ANDERSON,
Counsel for Appellants.

APPENDIX.

Determination Made by Interstate Commerce Commission.

At the request of the National Mediation Board pursuant to the proviso to the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, the Interstate Commerce Commission determined that the following lines of railroad operated by electric power are not street, interurban or suburban electric railways within said exemption proviso, viz:

Texas Electric Railway, 208 I. C. C. 193 (March 16, 1935).

Sacramento Northern Railway, 208 I. C. C. 203 (March 16, 1935).

Waterloo, Cedar Falls & Northern Railway, 208 I. C. C. 211 (March 16, 1935).

Piedmont & Northern Railway Company, 211 I. C. C. 4 (October 11, 1935).

Fort Dodge, Des Moines & Southern Railroad Company, 211 I. C. C. 9 (October 11, 1935).

Chicago Tunnel Co. *et al.*, 214 I. C. C. 81 (February 5, 1936).

Chicago South Shore and South Bend Railroad, 214 I. C. C. 167 (February 14, 1936).

Des Moines & Central Iowa R. R., 214 I. C. C. 353 (February 21, 1936).

Utah, Idaho & Central Railroad Co., 214 I. C. C. 707 (March 18, 1936).

Salt Lake & Utah R. R. Co., 214 I. C. C. 717 (March 18, 1936).

Pacific Electric Ry. Co., 215 I. C. C. 414 (May 8, 1936).

Hudson & Manhattan R. R. Co., 216 I. C. C. 745 (July 24, 1936). No freight revenue but 22.97% of total passenger revenue was derived from interline traffic.

Oklahoma Railway Co., 218 I. C. C. 123 (August 3, 1936).

New York, Westchester & Boston Ry. Co., 218 I. C. C. 253 (August 20, 1936). Freight revenue 4.2% of total revenue but held part of the New Haven Steam Railroad System.

In *Chicago North Shore and Milwaukee Railroad Company*, 219 I. C. C. 135 (November 7, 1936) the Commission felt constrained to follow the decision of the United States Supreme Court in *United States* v. *Chicago North Shore and Milwaukee Railroad Company*, 288 U. S. 1, and found that the interurban did fall within the terms of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act. The decision was reluctantly made and the Commission said:

> "Undoubtedly this is a close or borderline case, but considering the view expressed by the Supreme Court in the case hereinbefore cited, together with the absence of any opposition of record to the contention that the carrier is exempt, and the fact that no carload freight is handled to or from or interchanged at either of the two principal terminals which are much the largest cities served, the doubt must be resolved in favor of holding that the carrier falls within the exemption."

The Texas Electric Railway Case.

The Texas Electric Railway Company filed a bill of complaint for an injunction and petition for declaratory judgment against Clyde O. Eastus, United States Attorney for the Northern District of Texas, in the District Court of the United States for the Northern District of Texas at Dallas, seeking injunctive relief against prosecution for violation of the provisions of the Railway Labor Act, and a declaratory judgment decreeing plaintiff to be a street, interurban or suburban electric railway and not subject to the provisions of the Railway Labor Act. The defendant filed an answer and among other things by paragraph 19 alleged that:

> "The determination of the Interstate Commerce Commission has not been enjoined, set aside, annulled, or suspended by a statutory three-judge court under the Urgent Deficiencies Act of October 2, 1913 (38 Statutes 208, U. S. C. Title 28 Sec. 47) and accordingly must be accepted by the court as conclusive."

The determination and report of the Interstate Commerce Commission in the Texas Electric Railway matter, 208 I. C. C. 193, was attached as a part of the answer.

The District Court granted an interlocutory injunction and the matter is still pending.

Freight revenue was 16% of the passenger revenue in 1929, 30% in 1930, 37% in 1931, 53% in 1933 and 54% for the first half of 1934.

The Utah Idaho Central Case.

The Utah Idaho Central Railroad Company filed a bill of complaint for injunction and petition for declaratory judgment against Dan B. Shields, United States Attorney

for the District of Utah, seeking an injunction against the enforcement of the Railway Labor Act and a declaratory judgment decreeing that the plaintiff was a street, interurban or suburban electric railway and not subject to the provisions of the Railway Labor Act.

The defendant filed his answer and the Interstate Commerce Commission intervened and answered. The United States District Court for the District of Utah on October 15, 1936, entered a decree adjudging that the plaintiff was an interurban electric railway and exempt from the provisions of the Railway Labor Act.

The case has been appealed to the United States Circuit Court of Appeals for the Tenth Circuit and is now pending in that court.

During the five year period from 1930 to 1934 the freight revenue of the railway was 81.9% of the total revenue.

REPLY

BRIEF

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CHARL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1937.

No. 502

JOHN N. SHANNAHAN AND CLAUDE J. JACKSON, AS TRUSTEES OF THE PROPERTY OF CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD, ET AL.,

Appellants.

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Reply Brief for Appellants.

JOHN C. LAWYER,
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Appellees.

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Reply Brief for Appellants.

I.

The three-judge statutory court had jurisdiction.

Appellees claim that the determination of the status of the carrier by the Interstate Commerce Commission was not an order which, under the Urgent Deficiencies Act, the

three-judge statutory court had jurisdiction to set aside because:

1. There was nothing in the Commission's determination that could be enforced;
2. The determination results in no injury, the injury coming from the statute; and
3. The determination was not made by the Commission in the performance of its duties under the Act to Regulate Commerce.

1. Appellees rely on the cases of *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282, 293-294, and *Hooker* v. *Knapp*, 225 U. S. 306, to support their contention that there is nothing in the Commission's determination that could be enforced. The order in the case at bar is distinguishable from the cases relied upon by Appellees on the same ground that this court distinguished the order in *Baltimore & Ohio Railroad Company* v. *United States*, 264 U. S. 258, 264. In the cases of *Proctor & Gamble Co.* v. *United States*, and *Hocker* v. *Knapp*, the order denied the affirmative relief sought. In the case of *Baltimore & Ohio Railroad Company* v. *United States* and the case at bar, the order is affirmative—that is, it grants the full relief sought.

The determination by the Commission is an order because it fixed for the first time, by the only body authorized by law so to do, the status of the carrier. It is in this respect self-executing. *Nashville Chattanooga & St. Louis RR. Co.* v. *Wallace*, 288 U. S. 249, 259-264. By fixing the status the liability of the carrier was determined in reference to the obligations imposed by the Railway Labor Act. Such determination, *after hearing*, was *quasi* judicial in character and therefore reviewable in court. Under the statute this determination is in law an order that may be "set aside."

2. Appellees in support of their argument that the determination results in no injury, the injury coming from the statute, rely on *Lehigh Valley RR. Co.* v. *United States*, 243 U. S. 412, and *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469. In the *Lehigh* case the petition was dismissed and in the *Piedmont* case the application for a certificate of convenience and necessity was denied. Both orders were negative in substance and in form and fall squarely within the rule of *Proctor & Gamble Co.* v. *United States*. The petition in the *Lehigh* case having been dismissed and the application in the *Piedmont* case denied, the risk the carrier ran necessarily flowed from the statute and not from the order. However, in the case at bar the relief sought was not denied; but on the contrary the relief requested was given and the determination of the status of the carrier was made.

In the *Lehigh* case the statute applied if the Commission granted no relief. Hence when the Commission dismissed the petition of the carrier, the injury it might sustain flowed from the statute and not from the Commission's order. The same is true as to electric interurbans under the Safety Appliance Act of August 26, 1937 (49 U. S. C. A. Sec. 26(a)). In the case at bar the Commission having made the determination fixing the status of the carrier, the injury flows from the determination, just as the injury flows from a decree of divorce or adjudication of bankruptcy and not from the statute authorizing the divorce or the bankruptcy proceedings. If the Commission had determined that the carrier in the case at bar was an interurban and hence within the exemption proviso of the act, surely the determination would be an order and subject to review.

In the *Piedmont* case the statute required a certificate of convenience and necessity for an extension but exempted

interurbans. The carrier's application for a certificate was denied. Clearly the risk flowed from the statute. If the statute had authorized the Commission to determine the status and such determination had been made, the risk would then flow from such determination.

In the case at bar a legal injury flows from the erroneous determination of the status of the carrier as such erroneous determination for the first time brings the carrier under the Railway Labor Act. This status is fixed on the carrier by the determination of the Commission, contrary to law and without substantial supporting evidence.

The determination of the status of the carrier by the Commission is a condition precedent to the enforcement of the provisions of the Railway Labor Act against the carrier. The prescribed administrative remedy must first be invoked and exhausted.

Myers v. *Bethlehem Building Corporation* (Advance Sheets) ..... U. S. .....; 82 L. ed. 399, 404-5.

Mitchell Coal & Coke Co. v. *Pennsylvania Railroad Co.*, 230 U. S. 247, 255-258; 57 L. ed. 1472, 1476.

United States Navigation Co. Inc. v. *Cunard Steamship Co.*, 284 U. S. 474, 485; 76 L. ed. 408, 411-415.

Woodrich v. *Northern Pacific Railway Co.*, 71 Fed. (2d) 732, 734, 735; 97 A. L. R. 401, 404, 405; Note 406.

3. Appellants cite *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, to support their contention that the determination was not made by the Commission in the performance of its duties under the Act to Regulate Commerce.

The remedy under the Urgent Deficiencies Act to set aside orders of the Commission is not limited to orders

made by the Commission in the performance of its duties under the Interstate Commerce Act. An order of the Commission under the Boiler Inspection Act was set aside under the Urgent Deficiencies Act in *United States* v. *Baltimore & Ohio RR. Co.*, 293 U. S. 454, 458-462. The Railway Labor Act has been held to be a constitutional exercise by Congress of its power to regulate interstate commerce. *Virginian Railroad Co.* v. *System Federation No. 40, etc., et al.*, 300 U. S. 515, 553-559. The duty of the Commission to determine the status of the carrier under the Railway Labor Act is clearly and obviously an exercise of the power and duties conferred and imposed upon the Commission by Congress to regulate interstate commerce.

II.

The South Shore is an interurban.

In addition to the Railway Labor Act many other statutes exempt interurban electric railways from compliance with their requirements. These statutes have been cited at page 17 of Appellants' brief. The Appellees at page 22 of their brief call attention to repeated reports of the Commission pointing out that the statutory language exempting interurbans "was unsatisfactory" to the Commission. The fifty-first annual report of the Interstate Commerce Commission, issued November 1, 1937 at page 107, again recommends to Congress "that Section 1(22) and Section 20a(1) of part 1 of the Interstate Commerce Act be amended by substituting provisions exempting from our jurisdiction all street, surburban and interurban electric railways, except such as are operated as a part of general steam railroad systems of transportation *or are engaged in the general transportation of freight and interchange standard steam railroad freight equipment with*

*steam railroads for transportation of interstate or foreign commerce to or from points on their lines * * *.*" This recommendation does not include an amendment to the exemption proviso of Section One of the Railway Labor Act. This recommendation if necessary is inconsistent with the determinations by the Commission (cited at pp. 51 and 52 in the appendix to Appellants' brief) denying the electric railways the status of interurbans because of their freight business. These recommendations commenced with the thirty-fifth annual report of the Commission made in 1921. Congress has not seen fit to act on the recommendations. In 1933 Congress by Section 77(m) of the laws relating to bankruptcy defined the term "railroad corporation" for the purposes of said Section 77 as meaning any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, suburban or interurban electric railway which is not operated as part of a general steam railroad system of transportation or which does not derive more than 50 per cent of its operating revenue from the transportation of freight in standard steam railroad freight equipment. Congress in said Section 77 recognized that an interurban may derive more than 50 per cent of its operating revenues from the transportation of freight in standard steam railroad freight equipment and still maintain its status as an interurban.

We believe our first brief fully answers all other arguments made by Appellees.

We respectfully submit that the judgment of the District Court should be reversed.

Respectfully submitted,

JOHN C. LAWYER,
R. STANLEY ANDERSON,
Counsel for Appellants.